United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-255**
	)	**Issued: January 15, 2008**
DEPARTMENT OF THE TREASURY, SECRET SERVICE, Chicago, IL, Employer	)	

Appearances:
Gordon Reisalt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 1, 2006 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 11, 2006, denying modification of a prior decision determining appellant's wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly determined that the constructed position of license inspector/examiner properly represented appellant's wage-earning capacity.

FACTUAL HISTORY

On July 4, 1998 appellant, then a 29-year-old special agent, sustained an injury while loading luggage onto a C5 over his head. His left shoulder blade popped, causing a tear in the shoulder blade area of the left side of his back. On August 31, 1998 the Office accepted appellant's claim for left shoulder rhomboid strain and moderate left-sided herniated disc C4-5. Appellant stopped work on July 7, 1998 and returned to light-duty work on July 13, 1998. He

again stopped work on July 22, 1998. On October 12, 1999 the employing establishment terminated appellant during his probationary/trial period due to "unavailability for full duty." Appropriate medical and compensation benefits were paid. On March 15, 2002 the Office granted a schedule award for a 52 percent impairment of appellant's left upper extremity.

On February 1, 1999 Dr. Per Freitag, an orthopedic surgeon, performed a microscopic anterior cervical discectomy and fusion at the C4-5 level. On May 22, 2002 he referred appellant to physical therapy to strengthen his neck and upper extremity for three times a week. On June 10, 2002 the Office approved the aforementioned physical therapy.

On March 24, 2003 the Office referred appellant to Dr. Leonard R. Smith for a second opinion. In a June 6, 2003 medical report, Dr. Smith diagnosed appellant as "status postanterior cervical discectomy and spinal fusion and residual possible rhomboid myositis." He noted that x-rays taken at his direction of the left shoulder were essentially normal. Dr. Smith stated that appellant had reached maximum medical improvement and did not require additional medical treatment other than a home exercise program. He noted no particular need for any additional formal therapy or health club exercise or soft tissue mobilization. Dr. Smith found that appellant was able to work full time, although he did not believe that appellant could return to duty as a special agent without some restrictions on his activities. He submitted a work limitation form indicating that appellant was able to work eight hours a day with restrictions of reaching and reaching above his shoulder limited to one to two hours. Pushing, pulling and lifting was limited to 30 pounds.

By letter dated June 6, 2003, the Office asked Dr. Freitag to comment on Dr. Smith's report and to assess appellant's work restrictions. By letter dated October 18, 2003, the Office was informed by orthopedic surgery specialists that Dr. Freitag was no longer in their practice. Appellant was last seen by Dr. Freitag on August 16, 2001.

In an April 7, 2004 report, the vocational rehabilitation counselor noted that appellant was capable of performing the position of license examiner. According to the Illinois Department of Employment Security, this position existed in sufficient numbers earning an average of $20.13 per hour and was medically and vocationally suitable for appellant's return to work. The position of license examiner was listed as a light job requiring that appellant lift, carry, push and pull up to 20 pounds and to work inside greater than 75 percent of the time. This job description set forth the following duties:

> "Evaluates applications, records and documents to determine relevant eligibility information or liability incurred. Prepares reports of activities, evaluations, recommendations and decisions. Provides information and answers questions of individuals or groups concerning licensing, permit or passport regulations. Warns violators of infractions or penalties. Prepares correspondence to inform concerned parties of decisions made and appeal rights. Confers with officials, technical or professional specialists and interviews individuals to obtain information or clarify facts. Determines eligibility or liability and approves or disallows application for license. Scores tests and rates ability of applicant through observation of equipment operation and control. Visits establishments to determine that valid licenses and permits are displayed and that licensing

standards are being upheld. Issues licenses to individuals meeting standards. Administers oral, written, road or flight test to determine applicant's eligibility for licensing."

In a May 6, 2004 report, appellant's vocational rehabilitation counselor noted that he failed to participate in the job search and closed his file. On May 10, 2004 the Office proposed reducing appellant's compensation on the basis of his capacity to earn wages as a license inspector/examiner.

On May 25, 2004 the employing establishment responded to the Office's inquiry by indicating that, on the date of injury, July 4, 1998, appellant's base pay was $31,266.00 with a locality adjustment it was $34,146.00. The employing establishment noted that the current base salary of the job was $37,694.00 or $44,577.00 with locality adjustment. The employing establishment noted that appellant received law enforcement availability pay (LEAP) for one year prior to the date of the injury.

By decision dated July 19, 2004, the proposed reduction in compensation was made final.

On August 11, 2004 appellant requested an oral hearing which was held on March 17, 2005.

By decision dated June 15, 2005, the hearing representative affirmed the July 19, 2004 decision, finding that appellant's wage-earning capacity was represented by the position of license inspector/examiner and finding that the Office properly determined the amount of appellant's loss of wage-earning capacity.

By letter dated June 1, 2006, appellant requested reconsideration. He submitted a copy of a November 1, 2003 executive order from the State of Illinois instituting an immediate hiring and promotion freeze. Also enclosed was a September 22, 2005 letter from the State of Illinois, Department of Central Management Services, indicating that the tests for licensing inspector were currently closed.

By decision dated August 11, 2006, the Office denied modification of the July 19, 2004 wage-earning capacity.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[1]

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated

[1] *See Katherine T. Kreger*, 55 ECAB 633 (2004).

or the original determination was, in fact, erroneous.[2] The burden of proof is on the party attempting to show modification of the award.[3]

Under section 8113(a) of the Federal Employees' Compensation Act, if an individual was employed in a learner's capacity at the time of the injury, and the Office determines that the wage-earning capacity of the individual would have increased but for the injury, the Office shall recompute prospectively the monetary compensation payable for disability on the basis of an assumed monthly pay corresponding to the probable increased wage-earning capacity.[4]

ANALYSIS

The Board finds that the Office properly determined that the constructed position of license inspector/examiner represented appellant's wage-earning capacity.

Appellant contends that he was in a learner's capacity within the meaning of section 8113(a) of the Act at the time he sustained an employment-related injury on July 4, 1998.[5] The Board finds that appellant's contention is without merit. There is no evidence in the record that appellant was employed in a training or learner's capacity at the time of the injury. The fact that appellant was terminated during his probationary/trial period does not indicate that he was in a learner's capacity at the time of injury. The employing establishment indicated that appellant was employed for 20 months prior to the injury. Furthermore, appellant was receiving LEAP coverage on the date of his injury. The record establishes that appellant would not be entitled to LEAP coverage were he still in a trainee status or learner's capacity.

As appellant did not have actual earnings, the Office determined that the constructed position of license inspector/examiner represented appellant's wage-earning capacity. The notice of proposed reduction of compensation was dated May 10, 2004 and the reduction of benefits became effective July 19, 2004. In making the determination, the Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and education qualifications, in determining that this position represented his wage-earning capacity.[6] The Office properly determined that the position of license inspector/examiner properly represented appellant's wage-earning capacity.

The Office was unable to reach appellant's former treating physician, Dr. Freitag, for a determination as to appellant's work capacity restrictions. Accordingly, the Office referred appellant to Dr. Smith, who concluded that appellant was capable of working full time, with restrictions of reaching limited to one to two hours and pushing, pulling and lifting limited to 30 pounds. Based on these restrictions, the Office determined appellant's wage-earning capacity

[2] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[3] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986); *James D. Champlain*, 44 ECAB 438 (1986).

[4] 5 U.S.C. § 8113(a).

[5] *Id.*

[6] *Loni J. Cleveland*, 52 ECAB 171 (2000).

based on the constructed position of license inspector/examiner. The position is within the restrictions as set forth by Dr. Smith. Appellant's vocational rehabilitation counselor determined that he had the capability of performing this position and that it was available in sufficient numbers so as to make it reasonably available to him in his commuting area.

The Office then properly determined appellant's wage-loss capacity in accordance with the formula developed in the *Shadrick* decision and codified by section 10.403.[7] In this regard, the Office indicated that appellant's salary on July 7, 1998, when his disability began, was $819.57 per week, that the current adjusted pay rate for his job on the date of injury was $1,073.62 per week and that appellant was capable of earning $805.20 per week in the position of license inspector/examiner. The Office then determined that appellant had a 75 percent wage-earning capacity ($819.20 divide by $1,073.62) which was then multiplied by $819.57 to equal $204.90 per week. The Office went on to determine that appellant had a loss of wage-earning capacity by subtracting $819.57 to equal $614.67 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of $204.90 by subtracting $614.67 from $819.57. The Office then multiplied $204.90 by 2/3 as appellant had no dependents, which amounted to a compensation rate of $136.60 per week. The Office then applied cost-of-living adjustments to find the rate of $153.25. Accordingly, appellant's new compensation rate for every four weeks (prior to any deductions) was $613.00.

CONCLUSION

The Board finds that the Office properly determined that the position of license inspector/examiner represented appellant's wage-earning capacity.

[7] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 11, 2006 is affirmed.

Issued: January 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board